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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1329.

TODD SHIPYARD CORPORATION, successor by merger to ROBINS DRY DOCK & REPAIR COMPANY,
Petitioner,
(Respondent-Impleaded-Appellee),

against

GRACE PULEO, as Administratrix of the Estate of PETER PULEO, Deceased,
Respondent,
(Libellant-Appellee)

and

H. E. MOSS & COMPANY, owner of *S.S. Lucellum*,
Respondent,
(Respondent-Appellant).

BRIEF OF RESPONDENT, H. E. MOSS & COMPANY, IN OPPOSITION TO THE PETITION.

THE FACTS.

The facts are set forth clearly in the opinion of Judge Learned Hand, who wrote the majority opinion below. R. 269-275. The facts, as set forth by petitioner, are not in accord with the facts as set forth by Judge Learned Hand. Cf. R. 272 and petitioner's brief, p. 5.

Argument.

The petitioner bases its petition for certiorari on two grounds. Each ground is insufficient.

The first ground is that the decision below is in conflict with the decisions of the highest court of the State of New York, and that, under the rule laid down by this court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, the decision of the court below should have followed the decisions of the highest court of the State of New York.

This contention is erroneous because the rule laid down in *Erie Railroad Co.* v. *Tompkins* applies only to cases in which the jurisdiction of a Federal court depends on diversity of citizenship. In respect of admiralty cases, it does not apply.

> *Guaranty Trust Co.* v. *York,* 326 U. S. 99;
> *Holmberg* v. *Armbrecht,* 327 U. S. 392;
> *Ricketts* v. *Pennsylvania R. Co.,* 153 F. (2d) 757.

The second ground is that the Circuit Court of Appeals misconstrued the contract of indemnity involved herein.

Essentially, the position of petitioner is that a contract of indemnity may not be construed to indemnify the indemnitee against the result of his own negligence "unless such an intention clearly appears". As a general statement, the foregoing may not be questioned. However, it is for courts to determine when "such intention clearly appears". In the present case the Circuit Court held, in substance, that such an intention clearly appeared from the contract involved herein. R. 274, 275. Its decision was in harmony with the following decisions:

> *National Transit Co.* v. *Davis,* 6 F. (2d) 729;
> *Kokusai Kisen, etc.* v. *Columbia Stevedoring Co., Inc.,* 23 F. Supp. 403, 100 F. (2d) 1016;

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Clarke v. *Ames*, 267 Mass. 44;
Standard Accident Insurance Co. v. *National Fire Proofing Co.*, 39 Ohio App. 1;
City of Polytechnic v. *Redmon*, 217 S. W. 730 (Texas).

See also:

Santa Fe Ry. v. *Grant*, 228 U. S. 177, 191-193;
Ringling Bros.-Barnum & Bailey Combined Shows, Inc., vs. *Olvera*, 119 F. 2d 584.

Apparently, the New York courts, in construing such agreements, take the somewhat artificial position that the parties do not intend to indemnify against the consequences of an indemnitee's negligence, unless the intention so to do is "unequivocally expressed"—i.e., *in haec verba*.

Thompson-Starrett Co. v. *Otis Elevator Co.*, 271 N. Y. 36;
Employers' L. A. Corp. v. *Post & McCord, Inc.*, 286 N. Y. 254;
Walters v. *Rao Electrical Equipment Co.*, 289 N. Y. 57;
Schwartz v. *Merola Bros. Construction Corp.*, 290 N. Y. 145;
Semanchuck v. *Fifth Ave. & 37th St. Corp.*, 290 N. Y. 412.

The New York decisions represent an extreme which is not in accord with the general weight of authority, as represented by the cases already cited herein.

Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

Raymond Parmer,
Vernon Sims Jones,
Counsel for H. E. Moss & Company,
Respondent.